

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel. MICHAEL DEWINE,
OHIO ATTORNEY GENERAL,
30 East Broad St., 25th Floor
Columbus, Ohio 43215

and

Cleveland-Cuyahoga County Port Authority,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS; THE HONORABLE ERIC
FANNING, SECRETARY OF THE UNITED
STATES ARMY; THE HONORABLE JO-
ELLEN DARCY, ASSISTANT SECRETARY
OF THE ARMY FOR CIVIL WORKS;
LIEUTENANT GENERAL TODD
T. SEMONITE, CHIEF OF ENGINEERS AND
COMMANDING GENERAL, UNITED
STATES ARMY CORPS OF ENGINEERS;
BRIGADIER GENERAL MARK TOY,
UNITED STATES ARMY CORPS OF
ENGINEERS, GREAT LAKES AND OHIO
RIVER DIVISION; AND LIEUTENANT
COLONEL ADAM CZEKANSKI, DISTRICT
COMMANDER, UNITED STATES ARMY
CORPS OF ENGINEERS, BUFFALO
DISTRICT,

Defendants.

CASE NO. 1:16-cv-2328

JUDGE DONALD C. NUGENT

Stipulation and Order

FILED
2016 OCT -5 PM 3:51
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

WHEREAS Plaintiffs allege in the Complaint that Defendants have violated applicable law or regulations in determining that open-lake placement of dredged material in 2016 from the upper sixth mile of the Cuyahoga River Channel ("the Channel") is suitable in 2016;

WHEREAS, on September 22, 2016, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 6-1; and

WHEREAS, Plaintiffs and Defendants wish to avoid further litigation regarding the Motion for Temporary Restraining Order and expeditiously dredge Cleveland Harbor, including the Channel.

NOW, THEREFORE, through their undersigned counsel, Plaintiffs and Defendants hereby stipulate and agree to an Order as follows:

1. Promptly after the Court's approval of this Stipulation and Order, in a joint notice to the Court, Plaintiffs and Defendants shall withdraw Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Defendants' opposition to that motion.

2. Within 7 days of the Court's approval of this Stipulation and Order, the Corps agrees to award a contract for 2016 dredging Cleveland Harbor, including the Channel. The Corps agrees to take reasonable steps to award the contract for 2016 dredging earlier than 7 days after the Court's approval of this Stipulation and Order. After the award of the contract, the Corps shall request that its contractor take all steps consistent with the contract to commence dredging as expeditiously as possible.

3. The Corps shall initially advance the funds for 2016 dredging of the Channel, including the amounts required for placement of all dredged material in a confined disposal facility.

4. If the Corps ultimately prevails on the merits of the suit or if Plaintiffs withdraw this suit such that no merits determination is obtained, Plaintiff State of Ohio shall reimburse the Corps the costs documented as the additional costs required for confined disposal facility placement of dredged materials from the Channel in 2016 that is greater than the amount required for open Lake placement of these dredged materials.

5. For purposes of this Stipulation and Order, the Plaintiffs and Defendants will apply the "wrongfully enjoined" standard consistent with the standard of FRCP 65(c) to determine whether

"the Corps prevails on the merits of the suit" following a final non-appealable order; however, there shall be no requirement for the State to post any security as required by that rule.

6. In the event that the Plaintiffs and Defendants disagree as to whether the Corps has ultimately prevailed on the merits of the suit, either party may petition the Court for such a determination and the Court shall retain jurisdiction as necessary to resolve this dispute.

7. This Stipulation and Order is entered solely to resolve the temporary restraining order and preliminary injunction without litigation. This Stipulation does not represent an admission by any Party to any fact, claim, or defense concerning any issue in this or any other litigation.

8. This Stipulation has no precedential value and shall not be used as evidence by either Defendants or Plaintiffs in this litigation or any other litigation except as necessary to enforce the terms of this Stipulation and Order.

9. This Stipulation represents the entirety of the Parties' commitments. The terms of this Stipulation shall become effective upon approval by the Court.

IT IS HEREBY AGREED.

Dated:

JOHN C. CRUDEN

Assistant Attorney General
Environment & Natural Resources Division

s/ Benjamin R. Carlisle

BENJAMIN R. CARLISLE

s/ Reuben Schiffman

REUBEN SCHIFMAN

U.S. Department of Justice

Environment & Natural Resources Division

P.O. Box 7611

Washington, D.C. 20004

(202) 305-4224 - Schiffman

(202) 514-9771 - Carlisle

(202) 514-8865 - Facsimile

Reuben.schifman@usdoj.gov

Benjamin.carlisle@usdoj.gov

ALAN D. GREENBERG

U.S. Department of Justice

Environmental Defense Section
999 18th Street, Suite 370
Denver, Colorado 80202
Phone: (303) 844-1366
Fax: (303) 844-1350
E-mail: alan.greenberg@usdoj.gov

CAROLE S. RENDON
United States Attorney
Northern District of Ohio

Erin E. Brizius (#0091364)
Assistant United States Attorneys
801 West Superior Avenue, Suite 400
Cleveland, OH 44113
(216) 622-3670 – Brizius
(216) 522-4982 - Facsimile
erin.e.brizius2@usdoj.gov

Dated: October 4, 2016

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

S/ David Emerman

DALE T. VITALE (0021754)
DAVID E. EMERMAN (0089348)
JANEAN R. WEBER (0083960)
RICHARD N. COGLIANESE (0066830)
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400
Telephone: (614) 466-2766
Facsimile: (614) 644-1926
Dale.Vitale@OhioAttorneyGeneral.gov
David.Emerman@OhioAttorneyGeneral.gov
Janean.Weber@OhioAttorneyGeneral.gov
elsreview@OhioAttorneyGeneral.gov

Counsel for Plaintiff, State of Ohio

S/Louis McMahon (per email authorization)

LOUIS L. McMAHON (0067378)
KEELY J. O'BRYAN (0071438)

McMAHON DEGULIS LLP
The Caxton Building
812 Huron Road E, Suite 650
Cleveland, Ohio 44115
Telephone: (216) 621-1312
Facsimile: (216) 621-0577
mcmahon@mdllp.net
obryan@mdllp.net

*Counsel for Plaintiff,
Cleveland-Cuyahoga County Port Authority*

IT IS SO ORDERED.

/s/ Donald C. Nugent

DONALD C. NUGENT
United States District Judge

DATE October 5, 2016